No. 4684.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BETHLEHEM SHIPBUILDING CORPORATION, LTD., a Corporation,
Third Party Respondent and Appellant,
vs.
PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,
Respondent and Appellee;
JOSEPH GUTRADT COMPANY, a Corporation,
Libelant and Appellee.

PETITION OF APPELLANT BETHLEHEM SHIPBUILDING CORPORATION, LTD., FOR REHEARING.

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To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant, Bethlehem Shipbuilding Corporation, Ltd., respectfully asks for a rehearing in this case.

As appears from the opinion affirming the judgment appealed from, this was a libel filed by the Joseph Gutradt Company, appellee here, against the Pacific Mail Steamship Company for damage to cargo. The Bethlehem Shipbuilding Corporation, Ltd., appellant, was a third party respondent, having been impleaded

by the Pacific Mail Steamship Company, which prayed for judgment over on the ground that the cause of the damage to the cargo was the Bethlehem Corporation's breach of a contract to repair the ship "Ecuador". The decree was in favor of the Gutradt Company, libelant, against the Pacific Mail Company with judgment over against the Bethlehem Corporation, and the Bethlehem Corporation appealed.

The appellant contracted with the Steamship Company to make certain repairs to the Steamship "Ecuador", and to deliver the vessel alongside the pier of the Steamhsip Company ready to load cargo before 6 a. m. of October 11, 1923. The vessel was delivered by appellant to the Steamship Company on October 11, 1923.

Two days later the Steamship Company contracted with the Gudradt Company to transport certain soap from San Francisco to Norfolk, Va., and such soap was loaded by the Steamship Company on the "Ecuador" for transportation to Norfolk. On the voyage the soap was damaged by water which entered the hold in which the soap was loaded.

The Gutradt Company accordingly sued the Steamship Company to recover for such damage. Thereupon the Steamship Company caused appellant to be impleaded as a defendant in the action.

The opinion holds that appellant failed to properly perform the work on the "Ecuador" in that appellant left a clapper valve uncovered, and that the damage to the soap was caused by water which found its way into the hold in which the soap was stored, through said uncovered clapper valve.

It is shown in the opinion that the Steamship Company, after receiving the vessel from appellant, loaded the soap into the hold in which it was damaged without making any examination whatever of the vessel to see if the particular clapper valve in question in such hold was uncovered, although its attention had been called by one of the stevedores engaged in loading the hold in which such clapper valve was situated, to the fact that another clapper valve in that hold was uncovered and that as a result of such failure to examine said particular clapper valve, the "Ecuador" sailed with that valve uncovered, and that the damage to the soap was the consequence of such negligence by the Steamship Company.

As stated in the opinion, the clapper valve has a bonnet or cover which must be properly placed for the successful operation of the valve, otherwise sea water would enter the hold. After discharging the cargo in hold No. 2, in which the particular clapper valve in question was located, at Wilmington, it was found, that the water was rushing into No. 2 hold because of the bonnet being off the starboard clapper valve through which the water rushed.

To quote from the opinion:

> "When the ship was redelivered to the Pacific Mail Company the Bethlehem Shipbuilding Corporation had broken its contract by failing to repair the clapper valves in No. 2 hold and the mere statement of the fact that the defective clapper valve let the water in compels the view that the ship was unseaworthy. It, therefore, devolved upon the Steamship Company to show that due diligence was exercised to make the ship seaworthy under the pertinent provisions of the Bill

> of Lading. As between the Pacific Mail Company and the Gutradt Company, the duty of making the ship seaworthy was a non-delegable one; hence the Steamship Company could not successfully defend on the ground that it had made the contract with the Shipbuilding Corporation to repair and overhaul the clapper valves unless it could also show that the Shipbuilding Corporation had performed its contract."

Although the opinion shows that the most cursory examination of the starboard clapper valve in No. 2 hold would have disclosed the fact that such clapper valve was uncovered, and thus finds that the damage to the soap was caused by the failure of the Steamship Company to inspect the starboard clapper valve, which permitted the hold containing the soap to be flooded, and that the Steamship Company was guilty of negligence in not making such examination, and that such negligence was the direct and immediate cause of the damage to the soap, without which negligence the damage could not have occurred, and that, therefore, the Steamship Company had no defense to the action, the opinion proceeds to hold that appellant, because of its remote negligence was properly held liable in this action to the Steamship Company for the damage thus sustained by the Gutradt Company.

There is no pretense in the record on this appeal that the Steamship Company has paid the Gutradt Company the damages thus sustained. On the contrary, the finding is that the damages have not been paid, and the judgment is for the amount of such damages.

It is respectfully submitted that on the facts stated

in the opinion the appellant is not liable to the Steamship Company for the damages thus sustained by the Gutradt Company, and that such nonliability exists for two reasons:

1. The damage to the soap having been caused by the negligence of the Steamship Company in sending the "Ecuador" on a voyage without having made an examination of the starboard clapper valve in question, it cannot look to the appellant for reimbursement for its negligence.

2. That if appellant could be held liable to the Steamship Company in any case for such damage, it cannot be held liable for such damage until and unless the same is actually paid by the Steamship Company to the Gutradt Company.

3. The court misconstrued the real issues between appellant and appellee.

If appellant is correct in the statements thus made, the opinion in this case is clearly erroneous upon its face.

The amount involved in this appeal is not very large, $2,476.80, but the claim of the Gutradt Company is only one of a great many other similar claims, aggregating $126,661.67, and the Steamship Company is now contending that the opinion in this case, if allowed to stand, will establish principles of law which will be applied against the appellant in the proceedings involving the other claims, a libel for which has already been filed in the District Court by appellee against appellant.

It is, therefore, important to appellant, as well as to this Court, that the opinion in this case, if incorrect, shall not be allowed to stand.

1. *The law enjoined upon the Steamship Company the duty of seeing that the clapper valves in hold No. 2 were properly covered and it could not relieve itself of such duty by any contract or arrangement with appellant.*

The United States Statutes declare that it shall not be lawful for the owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any agreement whereby it shall be relieved from liability for loss or damage arising from negligence, fault or failure in properly loading of any merchandise committed to its charge.

27 U. S. Stats. L. 445;
6 Fed. Stats. Ann. (2d ed.), pp. 371, 376;
The Calderon vs. *Atlas S. S. Co.,* 170 U. S. 272;
The Tampico, (N. D. Cal.) 151 Fed. 689.

To permit the Steamship Company to escape liability for its deliberate disregard of its statutory duty to see that the "Ecuador" was seaworthy before it left San Francisco, by transferring such liability to the appellant, would, it seems to us, be to put a premium upon such violation of the law and to permit the Steamship Company to do indirectly what it could not do directly.

2. *It is an elementary principle of law that an agreement to indemnify a person against the consequences of a future violation of law is absolutely void.*

The rule is declared in California as follows:

An agreement to indemnify a person against an act thereafter to be done is void, if the act be known to such person at the time of doing it, to be unlawful.

Civ. Code, sec. 2773.

The contract between the Steamship Company and appellant was made in California and hence it is subject to the laws of California and to the code provision in question.

Had the contract between the Steamship Company and appellant expressly provided that appellant, after making the repairs, should deliver the "Ecuador" to the Steamship Company in a seaworthy condition, ready for loading of cargo, and that the Steamship Company should not make any examination of the holds of the vessel to ascertain if the vessel was seaworthy, and that appellant would hold the Steamship Company harmless against all liability for damages caused by the flooding of the holds by water entering the holds through the uncovered clapper valves, and had the Steamship Company, in reliance on such contract, refrained from examining the clapper valves, this Court would be compelled to hold that such contract was contrary to public policy and to the laws of the United States and of the State of California, and, therefore, wholly void.

And yet the opinion in this case clearly holds that

the contract between appellant and the Steamship Company is, in effect, precisely such a contract of indemnity, and that, because it is such a contract of indemnity, the Steamship Company may recover from appellant the amount of the damage to the Gutradt soap.

We believe no case can be found which in the remotest way affords any support for holding that, by the contract between appellant and the Steamship Company, appellant became bound to indemnify the Steamship Company against damage to cargo resulting from the Steamship Company's disregard of its statutory duty to see that the vessel was seaworthy before placing cargo in the holds.

In *Forsyth* vs. *Woods,* 11 Wall. 484, 487, it was said:

> "The promise, if any, of the firm was to indemnify the defendant for doing an act planned and intended to enable his principal in the administration bond to commit a gross breach of trust. The arrangement was entered into in order that the partnership might obtain the possession of all the effects, goods, chattels, rights, and credits which had belonged to the intestate decedent, and which were assets that the administrator only had the right to hold. It was also a part of it that the administration should be conducted by the firm and not by the person to whom the probate court committed it. To this arrangement the defendant became a party, and he signed the bond in view of it, and in order that it might be carried out. This appears from the plea. It needs no argument to show that the transaction was against the policy of the law and plainly illegal."

Accordingly the judgment in favor of the indemnitor was affirmed.

In the present case the contract of appellant, as construed by the opinion, was to indemnify the Steamship Company against a gross breach of statutory duty.

We do not question the right of the owner of a vessel to be indemnified against damage to cargo caused by latent defects in the vessel which would not have been discovered by an examination of the vessel; but in this case the defects were open and visible, and their presence must have been observed had an examination been made of Hold No. 2 before cargo was stored in the hold.

In this case the judgment itself establishes that the Steamship Company was guilty of negligence in not examining the clapper valves in Hold No. 2 and that the damage to the Gutradt soap would not have occurred but for such neglect.

A person is not entitled to indemnity for payments made by him on a judgment against him for injuries to a third person, where it is apparent that the judgment was based on his own negligence or wrong, or that of his employees.

> 31 Corpus Juris, 450.
>
> "That one cannot recover damages for an injury, to the commission of which he has directly contributed, is the rule of established law. It matters not whether that contribution consists in his participation in the direct cause of the injury or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury he is without remedy against one also in the wrong."
>
> *Little* vs. *Hackett*, 116 U. S. 371.

Where an action against a party seeking indemity from another involves the actual negligence of the defendant therein, the latter, indemnitor, canot be required to defend the action and is not bound by the judgment therein.

Con. H. M. L. M. Co. vs. *Bradley,* 171 Mass. 127.

In *Gregg* vs. *Page Belting Co.,* 69 N. H. 247, 46 Atlantic 26, the plaintiffs, whose elevator was operated by a belt, caused the belt to be repaired by the defendant. By reason of defects in the repairing of the belt the elevator of the plaintiffs fell, causing injuries to an employee of the plaintiffs. The employee sued the plaintiffs for damages upon the ground that the belt was not properly repaired, that the elevator was improperly constructed, and was improperly equipped. The belting company was notified by the employer, of the suit, and requested to defend it, but neglected to do so. The employee recovered judgment; the judgment was paid by the employers, who then sued the belting company to recover the amount of the judgment, basing their claim on the negligence of the defendant in repairing the belt. The trial court directed a verdict for the belting company and the employers appealed. Held: That the verdict of the jury established that both the employers and the belting company were negligent and that the employee would not have been injured if either plaintiffs or the belting company had exercised care and that, therefore, plaintiff could not recover from the belting company. The Court declaring the rule to be that where a per-

son injured recovers damages from the one who caused the injury, the latter cannot recover over against another whose negligence primarily caused the injuries, if the negligence of the party against whom judgment is recovered in any way contributed to the injuries.

In *Union Stock Yards Co.* vs. *C. B. & Q. R. Co.,* 196 U. S. 217, the defendant turned over to the plaintiff for switching to plaintiff's stock yard, a boxcar which was in bad condition, in that the nut above the wheel on the brake staff was not fastened on the wheel, but rested upon the wheel as though it was fastened thereon. Had an inspection been made, the fact that the nut was not fastened would have been discovered. A brakeman of the plaintiff, while handling the car, by reason of the looseness of the nut, was caused to fall from the car and received injuries. The employee sued the plaintiff to recover judgment on the ground that his injuries were received by reason of the negligence of the plaintiff's employer to inspect the car. Plaintiff having paid the judgment sued the railroad company for the damages sustained by it in being forced to pay the judgment. The case came before the Supreme Court on a certificate from the Circuit Court of Appeals propounding the following question:

> "Is a Railroad Company which delivers a car in due order to the terminal company, that is under a contract to deliver it to its ultimate destination on his premises, for a fixed compensation to be paid to it by the Railroad Company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained

> while in the customary discharge of his duty of operating the car by reason of a defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

This question the Supreme Court answered in the negative. In the opinion of the Supreme Court it is said:

> "Coming to the further question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done."

The opinion then proceeds to show that the cases in which it has been held that one wrongdoer who has paid a judgment for damages caused by its wrongful act, may recover the amount thus paid from the joint wrongdoer, were cases in which the other wrongdoer was the active cause of the injury, and the party who paid the judgment was not a participant in the wrongful act, and had nothing to do with such act, but was held liable because of its relation to the active wrongdoer, or to the property where the accident happened, such as cases where an employer is held liable for the wrongful act of its employee, done without its knowledge, and where a municipality is held liable for injuries caused by an obstruction on the street placed there by a property owner or other person without its knowledge. It is then stated by the Court that while it was the duty of the Railroad Company to have inspected the car and to have repaired the defect in the brake, it was also the duty of the plaintiff to have inspected the car and reported the defect in the brake.

The opinion then states as follows:

> "In the present case the negligence of the parties has been of the same character. Both the Railroad Company and the Terminal Company failed, by proper inspection, to discover the defective brake. The Terminal Company, because of its fault has been held liable to one sustaining an injury thereby. I do not think the case comes within that exceptional class which permits one wrongdoer, who has been mulcted in damages, to recover indemnity contribution from another."

We respectfully submit that the decision just referred to and quoted from is conclusive in this case and that it is impossible to distinguish this case from that case, and that, therefore, the opinion in this case is erroneous.

Where a Railroad Company delivered one of its cars to another Railroad Company for delivery at point of destination on the latter's line, and a brakeman of the latter company is injured by falling from the car, caused by the giving away of a handhold, through decay of the wood to which it was attached, in an action by the injured employee against his employer, the receiving line, to recover damages for the injuries, the latter interpleaded the delivering line, making it a party defendant. Judgment was recovered by the employee against the defendant employer, and by the latter against the delivering line. Held: That by reason of the negligence of the receiving line, the delivering line was not liable over to the receiving line.

G. H. & S. A. Ry. Co. vs. *Naas,* 94 Tex. 255, 59 S. W. 870.

"The duty of a Railroad Company to inspect the cars of other roads, received by it, is enjoined by law, and its dereliction of duty, in the event of an injury to its employee from such cars, is the proximate cause of the hurt, and the negligence of the company delivering over the unsafe cars is a remote cause."

Missouri, Kansas & Texas R. R. Co. vs. *Merrill,* 65 Kan. 436, 70 Pac. 358.

Egan, a longshoreman, engaged at work for the Alaska P. S. S. Co., was injured while assisting in loading one of its steamers at the Sperry Flour Company dock in Tacoma harbor. The Flour Company owned and operated a flour mill on the waterfront and maintained thereat a dock and dolphin for the use of the shippers coming to its place for cargo. After the vessel was loaded the longshoreman was sent to cast off the vessel's line from the dolphin and in order to perform that duty walked on a plank from the shore to the dolphin, and whole thus walking the plank slipped off the dolphin, causing the longshoreman to fall upon the rocks below and sustain injuries. Egan sued the Alaska P. S. S. Co. to recover damages for his injuries and recovered judgment which was paid by the Steamship Company. The Steamship Company then sued the Flour Company on the theory that the latter was obligated to furnish the Steamship Company and Egan, the longshoreman, a safe approach to the dolphin, which it had negligently failed to do, and that such negligence was the cause of Egan's injuries. Judgment went for the Flour Company and the Steamhsip Company appealed. Held: That both the Steamship Company and the Flour

Company were negligent and that the Steamship Company therefore could not recover over from the Flour Company.

Alaska P. S. S. Co. vs. *Sperry Flour Company,* 182 Pac. 634;
Alaska P. S. S. Co. vs. *Sperry Flour Company,* 211 Pac. 762-763.

In *City of Tacoma* vs. *Bonnell,* (Wash.) 118 Pac. 642, the plaintiff City maintained a municipal electric power plant and a system of wires, consisting of high voltage and low voltage wires, the latter conveying electricity direct to consumers. The defendant carelessly caused a plank to fall on both systems of wires, thus causing the current from the high voltage wires to pass directly into the low voltage wires instead of through transformers, with the result that a person who came into contact with the low voltage wires received the current from the high voltage wires and was killed. The widow and minor children recovered a judgment against the City for the death, the judgment being based upon the claim of the widow and children that the death was caused by the negligence of the City in not protecting its low voltage wires from the possibility of thus receiving the current direct from the high voltage wires. The City, having paid the judgment, sued the defendant for reimbursement. Held: That the City was guilty of active negligence in maintaining its wires in such dangerous condition, and that the City and the defendant were joint wrongdoers, and that, therefore, the City was not entitled to contribution from the defendant.

As we have said, the judgment in this case establishes, and the opinion of this Court holds, that the Pacific Mail Steamship Company was negligent in not inspecting the clapper valves of Hold No. 2. Under the authorities to which we have just referred, it is clearly impossible, legally, for the Steamship Company to hold appellant liable to it for the damages it may be compelled to pay the Gutradt Company, because of its negligence.

3. *If the appellant can, by reason of the implied contract to indemnify the Steamship Company against damage to cargo, caused by failure of the latter to examine the clapper valves, be held liable to the Steamship Company, it can only be held liable in the event of actual payment of the damages by the Steamship Company, and such payment by the Steamship Company is a condition precedent to any right of action against the appellant.*

The right to sue for indemnity for damages resulting from negligence, misfeasance or malfeasance of another occurs only when payment has been actually made by the indemnified party.

31 Corpus Juris, p. 452;
Powers vs. *Munger*, 52 Fed. 705;
San Joaquin Valley Bank vs. *Gate City Oil Co.*, 36 Cal. App. 791;
Terry vs. *Southwestern Building Co.*, 43 Cal. App. 372;
Dunn vs. *Uvalde Asphalt Paving Co.*, 175 N. Y. 218, 67 N. E. 439.

3. (a) *The issue between the parties to this action on the question of damages is not whether the damages claimed naturally ensued from the breach of the contract for repairs.*

This Court ruled in its opinion that the appellant was liable to the Steamship Company for the damages claimed, because such damages naturally ensued from the breach of the contract for repairs. Appellant's contention was (Brief, pp. 5 to 35) that the damages were special and not general.

The ruling of the Court is in no way inconsistent with that contention, nor is it at all relevant, because both general and special damages naturally ensue from the breach of the contract. If it appears that the damages claimed are such damages as usually follow in the great multitude of similar cases, then the damages are classed as general and allowed as of course. It is a matter of common knowledge, as well as proved by the lack of cases, that failure to make repairs upon a vessel is not usually followed in the great multitude of such cases by damage to cargo. The present case is the only one of its kind where such a claim has ever been presented for decision. It follows, then, that the damages here claimed must necessarily be special damages, and in order to collect them the Steamship Company must make it appear by competent evidence that that liability was assumed by the appellant at the time that the agreement for the repairs was made. In other words, the circumstances must show that the assumption of such a liability was was made a condition of the contract. That was the issue squarely framed between the appellant and the

Steamship Company, and in justice to our client we feel compelled to request the Court in this petition to pass on that issue.

One word more on that point. This action is purely for breach of contract, and we are not concerned with those cases based upon negligence, where the rule of damage is that the party guilty of negligence is liable for all damage caused by the negligent act which might reasonably have been anticipated. There is a very sharp distinction between the rule of damages in cases *ex contractu* and *ex delicto.*

3. (b) *The issue between the appellant and the Steamship Company was not whether the officers of the "Ecuador" were bound to anticipate a breach of the repair contract, and hence whether they were guilty of negligence.*

The contention of the appellant was that all of the officers of the vessel were in No. 2 hold prior to the time that any cargo was loaded therein, and that they could have seen that the valve was defective if they had looked. That their attention was called to one defective valve in that hold, and they could have ascertained by inspection, or by telephoning the appellant, the condition of the other valves in that hold. Furthermore, at the end of the first twenty-four hours that the vessel was on the voyage they knew that an excessive amount of water was flowing into No. 2 bilge, it then being over the bilge tops and into the cargo hold. The appellant argued that under those circumstances it should be held that the officers of the vessel knew, or ought to have known, that water was flowing into No. 2 hold, which should have been

kept down by the bilge pumps. In other words, by the exercise of reasonable exertion, called for by the facts of which they had notice, the damage to the cargo could have been prevented. This contention, we submit, is sound under the authorities on pages 71 to 82, inclusive, of our brief, and we believe that it is not squarely met by the ruling that the officers of the "Ecuador" were not bound to anticipate a breach of the repair contract, and, therefore, they were not guilty of negligence.

It is respectfully submitted that a rehearing should be granted in this case.

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Proctors for Appellant.